

EVALUATION OF THE ECODESIGN DIRECTIVE (2009/125/EC): Draft final report by Centre for Strategy and Evaluation Services and Oxford Research

Digital Interoperability Forum comments

The Digital Interoperability Forum (DIF) welcomes the opportunity to comment on the draft final report on the Evaluation of the Eco-design Directive. DIF represents major players¹ in the pay TV value chain. DIF members include manufacturers, software vendors, and pay TV operators who manufacture, specify, design and deploy complex set top boxes (CSTBs). Acknowledging the need to further enhance the energy efficiency of CSTBs and to reconcile this with dynamic innovation in response to consumer demand for new services and functionalities DIF led the creation of the Voluntary Agreement (VA) for CSTBs and secured the participation in the Voluntary Agreement of a large majority of the industry. DIF is committed to the success of the VA.

DIF's comments focus primarily on the consultants' statements on voluntary agreements. As stated at the Stakeholder Meeting on 18 January DIF concurs with the view that "voluntary agreements are not an easy option". This view applies not only to the period when a VA is being created but also to its continued operation. A principal reason for this is the lack of certainty – and potential confusion – which is created by the status of a VA under the Directive.

Recital 18 of the Directive states that:

Priority² should be given to alternative courses of action such as self-regulation by the industry where such action is likely to deliver the policy objectives faster or in a less costly manner than mandatory requirements

And at Article 15(1):

Where a product meets the criteria listed under paragraph 2 of this Article, it shall be covered by an implementing measure or by a self-regulation measure in accordance with paragraph 3(b) of this Article.

¹ The Digital Interoperability Forum (DIF) membership includes *BSkyB, Deutsche Telekom, Groupe Canal+, Irdeto, Liberty Global, Microsoft, NagraVision, NDS, Pace, Sky Deutschland, Sky Italia, Viaccess, and ZetaCast.*

² Contrary to the statement on p148 of the Evaluation of the Eco-design Directive Report, VAs are not simply an alternative, they are to be preferred under the Directive.

From the above it follows that the priority is to be given to self-regulatory mechanisms such as the VA. Moreover, since the two are presented as alternatives, where there is a VA then the Commission may not impose an implementing measure (IM) on a product which is subject to a VA. However, DIF understands that the Commission's view is the contrary and, according to the Commission, a product may be subject to both a VA and an IM. In fact the Commission considers that a VA cannot prevail over an IM, despite the practice to use an IM for a particular product so that the provisions of a product-specific IM prevail over another IM. So for example, Article 4 of the Simple STB regulation (107/2009) provides the following:

The requirements laid down in this Regulation shall prevail over the requirements laid down in Regulation (EC) No 1275/2008.

The Commission's view appears to be that a VA cannot be a legal instrument under the Directive and, hence, it is simply not possible for a VA to prevail over an IM. This view creates a situation in which signatories to the VA for CSTBs are faced with legal uncertainty and double jeopardy.

For example, although there are differing legal opinions DIF understand that the Commission considers that CSTBs fall within the scope of Regulation 1275/2008, the horizontal standby Regulation. Thus, according to the Commission view CSTBs would have to meet the standby and power management requirements of that Regulation (and any relevant changes arising from amendments to accommodate obligations relating to network standby) or the manufacturer must be able to claim that the obligations are "inappropriate for intended use". Thus CSTB manufacturers have to consider two instruments: the standby Regulation and the VA.

In this context DIF notes and supports the view that Regulation 1275 would benefit from "clear guidance at the European level to reconcileinterpretations"³. The absence of such guidance, which should include guidance of factors to be considered in declaring that the legislative requirements are "inappropriate for intended use", exacerbates the confusion and provides another arguments for permitting the VA for CSTBs to prevail over an IM.

The practical effect of the Commission's view on the legal status of a VA is to reduce any VA's efficacy. If, say, a signatory to the CSTB VA decided to comply with Regulation 1275 in order to minimise legal uncertainty, then the flexibility

³ Evaluation of the Eco-design Directive Report, P138

afforded by the VA becomes impaired. This arises because the VA for CSTBs uses a total energy consumption (TEC) approach which allows manufacturers to produce, and platform operators to specify, products which have a total energy consumption of x but which, within x , can have quite different levels of energy consumption for different functionalities. By constraining the standby function to a specific level the flexibility is considerably diminished – and may even be eliminated.

DIF considers that the Commission should revisit its view on the status of VAs under the Directive. If the current situation persists then the aspiration to have more VAs may never be realised and an opportunity will be lost. The issues outlined above are also indicative of the need to improve “regulatory efficiency”⁴.

Despite this significant difficulty DIF believes that VAs have a substantial role to play in achieving eco-design policy objectives. As stated at the Stakeholders’ meeting these include:

- Flexibility to accommodate technological developments within energy efficiency requirements without recourse to a statutory process;
- Genuine harmonization across the single market with one set of reporting and enforcement procedures, thereby contributing to the goals of the single market and eliminating the uncertainty which arises from the existence of 27 market surveillance regimes;
- Greater transparency through independent monitoring and reporting;
- Greater accountability with the attendance of civil society, Member States and the Commission at VA Steering Committee meetings;
- The involvement of experts, i.e. the industry, in devising and developing the requirements in the VA; and
- Reduced pressure on the Commission’s resources⁵.

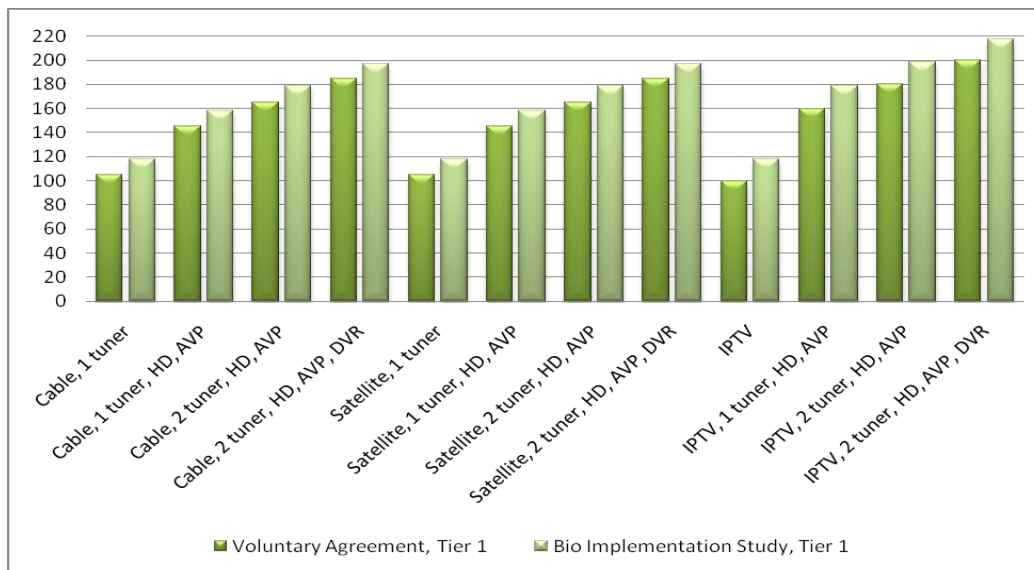
According to the report stakeholders have commented that VAs “*tend not to set sufficiently stringent requirements*”⁶. It goes on to state that “*in all cases the*

⁴ DIF notes that the consultants use the concept of “regulatory efficiency” in the context of the relationship between eco-design and other environmental legislation. In DIF’s view care has to be taken to avoid the double jeopardy which could occur if eco-design measures contained also other life cycle obligations. Nonetheless DIF considers that it is worth exploring whether the VA for CSTBs could embrace some broader environmental objectives.

⁵ DIF notes that the report (page 150) suggests that the “difference in resources needed appears to be rather limited”. However, DIF considers that the resources required to support VAs will diminish as experience of VAs grows.

⁶ P148

initial proposal from industry had to be reviewed to[...]provide savings commensurate with those that were possible with a regulatory initiative”⁷. This is an incorrect statement in relation to the VA for CSTBs which DIF asks the consultants to correct. In fact some changes were required⁸ to be made to use the same definitions (for example, for a return path) as those used by the consultants doing the preparatory study but, as the chart below shows, the VA proposal for Tier 1 was always intended to achieve higher efficiency gains.



DIF notes that the report states that the overall process for a VA is not much faster than for an IM⁹. It may be helpful to set out the timetable for the establishment of the VA for CSTBs:

- September 2007: Preparatory study (Lot 18) commenced
- April 2008: Industry VA kick-off meeting
- June 2009: Version 2 of the VA submitted to the Commission
- October 2009: VA presented to Consultation Forum
- July 2010: Tier 1 of the VA effective
- July 2013: Tier 2 of the VA effective

The timetable above is faster than an IM and it should also be noted that industry has been working in implementing the VA’s targets since 2009¹⁰

⁷ ibid

⁸ By the Commission

⁹ P150

¹⁰ Accordingly the reference (page 121) to the VA “nearing completion” is misleading.

despite it not being formally endorsed (even yet) by the Commission. DIF understands that the Commission has had to explore and determine the steps necessary for it to endorse the VA and this has undoubtedly contributed to any delay and their own resource requirement. Furthermore the absence of a formal endorsement had hindered the development of the VA, with some companies understandably being reluctant to commit to the VA while the uncertainty about its adoption continues – a chicken/egg situation.

DIF would like to comment also on the proposal¹¹ that an Executive Agency (for example, the Joint Research Centre) could undertake roles such as co-ordination with related legislation, development of working plans and preparatory studies, data collection and analysis. DIF understands that this has been advocated by some Member States in particular, as a means of improving operational efficiency.

As the consultants may be aware, JRC has sponsored for a number of years a Code of Conduct concerning the energy efficiency of Digital TV services. Some DIF members have been involved with that Code at various stages of its existence. More recently various concerns have been expressed about the transparency, governance, etc of that Code and its ability to co-exist with the VA for CSTBs without causing regulatory confusion. Discussions are taking place with JRC to reach an accommodation. Even when this is achieved, however, it remains questionable whether JRC has – under its current structure and resourcing – the necessary expertise to assume some of the responsibilities of the Commission. As the report notes “a more detailed case would need to be considered”¹².

¹¹ Evaluation of the Eco-design Directive Report P156

¹² Evaluation of the Eco-design Directive Report P156